Dato' Mohamad Salim Fateh bin Fateh Din v Nadeswaran a/l Rajah (No 1)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S23NCVC-6 OF 2001
AMELIA TEE ABDULLAH J
27 APRIL 2012

Tort — Defamation — Libel — Journalist published defamatory statements about prominent businessman on Twitter — Businessman's demand to cease defamation and to retract and apologise met with further Tweet suggesting readiness to do 'battle' — Whether defendant's conduct deserved award of aggravated damages — Factors to be considered when assessing damages for libel — Effect of failure to file defence

The plaintiff, a prominent businessman, sued the defendant, a journalist, for publishing two defamatory statements about him on Twitter. The plaintiff said the postings made by the defendant could be read by anyone who accessed his website and he had thousands of 'followers' of his Tweets, among them prominent corporate figures, politicians and media personalities. The plaintiff testified that despite his solicitor's demand to the defendant that he cease and desist from publishing the defamatory statements and make a full and unequivocal written apology and retraction of the statements, the defendant had instead further tweeted that the plaintiff was trying to intimidate him and that he ('the defendant') 'love a good battle' and would 'take him on'. The plaintiff said the defamatory statements damaged his reputation and caused him extreme embarrassment and distress. He claimed for general, aggravated and exemplary damages, a full and unequivocal public retraction and apology for the defamation and an injunction restraining the defendant, his servants and agents from further defaming him. The defendant failed to file and serve a defence, nor did he attend court for the trial of the suit.

Held:

(1) As the defendant served no defence, he was deemed to have admitted each and every averment in the plaintiff's statement of claim. Consequently, the court only had to deal with the issue of damages to be awarded to the plaintiff (see para 45).

(2) Not only did the defendant fail to reply the plaintiff's solicitor's letter, his further tweet suggested he had no intention to cease and desist. He was, in fact, priming himself up for "battle". It reflected the defendant's arrogance and dismissiveness of the plaintiff's efforts to resolve the matter. This factor clearly lent towards a higher amount in damages (see paras 61 & 62).

(3) The court was of the view aggravated damages should be awarded in light of the defendant's conduct in failing to apologise and failing to withdraw the offending statements from his website which remained there right up to the date of the hearing (see para 63).

(4) The defendant should have exercised a greater degree of care over his tweets knowing full well they could and would be seen by many. The amount of damages and aggravated damages awarded must be such as to send a strong message to those in a position to disseminate information widely, whether through the printed media or the internet, to exercise a proper degree of care and diligence and not to injure others. They must curb and regulate themselves so as not to run afoul of the law (see para 64).

(5) The court had no hesitation in accepting the plaintiff was a prominent person who held key positions in society and business, locally, regionally and internationally; a person who was held in high esteem and whose reputation would be seriously damaged by the defamatory statements (see para 49).

(6) There was no merit in the defendant's submission that since the plaintiff had not proven the quantum of the losses he had suffered as a result of the defamatory statements he should not be entitled to the damages sought (see para 59).

[Bahasa Malaysia summary

Plaintif, ahli perniagaan yang terkenal, mendakwa defendan, seorang wartawan, kerana mengeluarkan dua kenyataan fitnah tentangnya di Twitter. Plaintif menyatakan bahawa komen-komen yang dibuat oleh defendan boleh dibaca oleh sesiapa sahaja yang mengakses laman sesawangnya dan dia mempunyai beribu-ribu 'followers' tweets, antaranya tokoh korporat terkenal, ahli politik dan personaliti-personaliti media. Plaintif memberi keterangan bahawa meskipun peguamnya telah meminta defendan untuk berhenti mengeluarkan kenyataan fitnah dan meminta maaf secara bertulis dengan jelas dan menarik balik kenyataan-kenyataan tersebut, defendan sebaliknya 'tweeted' bahawa plaintif telah cuba menakut-nakutkannya dan bahawa dia ('defendan') 'love a good battle' dan akan 'take him on'. Plaintif mengatakan bahawa kenyataan-kenyataan fitnah tersebut telah merosakkan reputasinya dan menyebabkan rasa malu dan tertekan kepadanya. Dia menuntut untuk ganti rugi am, keterlaluan dan teladan, penarikan balik secara awam yang jelas dan meminta maaf untuk fitnah dan injunksi menghalang defendan, pembantu-pembantu dan agennya daripada selanjutnya menfitnahnya. Defendan gagal memfail dan menyampaikan pembelaan, ataupun menghadiri mahkamah untuk perbicaraan guaman tersebut.

Diputuskan:

(1) Memandangkan defendan tidak menyampaikan sebarang pembelaan,

dia dianggap telah mengakui setiap kenyataan di dalam penyataan tuntutan plaintif. Selanjutnya, mahkamah hanya perlu menangani isu ganti rugi yang perlu diberikan kepada plaintif (lihat perenggan 45).

(2) Bukan sahaja defendan gagal untuk membalas surat peguam plaintif, Tweet beliau selanjutnya mencadangkan dia tidak mempunyai sebarang niat untuk berhenti. Dia, sebaliknya, bersiap sedia untuk 'battle'. Ia menggambarkan keangkuhan defendan dan mengendahkan usaha plaintif untuk menyelesaikan perkara tersebut, Faktor ini dengan jelas membawa kepada amaun ganti rugi yang lebih tinggi (lihat perenggan 61 & 62).

(3) Mahkamah berpandangan bahawa ganti rugi keterlaluan seharusnya diberikan melihatkan kepada tindakan defendan yang gagal untuk meminta maaf dan menarikbalik kenyataan yang menyakitkan hati daripada laman sesawangnya yang masih berada di situ sehingga tarikh perbicaraan (lihat perenggan 63).

(4) Defendan seharusnya lebih berhati-hati terhadap Tweetnya memandangkan dia mengetahui ia akan dilihat oleh orang ramai. Amaun ganti rugi dan ganti rugi keterlaluan yang diberikan hendaklah memberikan mesej yang kuat kepada mereka yang di dalam posisi untuk menyebarkan informasi secara meluas, sama ada melalui media yang diterbitkan atau rangkaian internet, untuk lebih berhati-hati dan tidak menyakiti orang lain. Mereka hendaklah mengawal selia diri mereka sendiri supaya tidak melanggar undang-undang (lihat perenggan 64).

(5) Mahkamah tidak teragak-agak untuk menerima plaintif sebagai seorang yang terkenal yang memegang posisi utama dalam masyarakat dan perniagaan, secara tempatan, serantau dan luar negara; seseorang yang dipandang tinggi dan yang mana reputasi akan terjejas dengan serius oleh kenyataan fitnah (lihat perenggan 49).

(6) Tidak terdapat merit dalam hujahan defendan bahawa memandangkan plaintif tidak membuktikan kuantum kerugian yang dialami olehnya akibat daripada kenyataan fitnah dia tidak berhak terhadap ganti rugi yang diminta (lihat perenggan 59).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011) paras 484–485.

Cases referred to

Aetna Universal Insurance Sdn Bhd v Fire Accident & Marine Sdn Bhd [2001] MLJU 480; [2001] 4 CLJ 753, HC (folld)

Chang Kow Chin v Kammala a/p S Kumarasamy & Ors [1998] MLJU 5; [2000] 2 CLJ 167, HC (folld)

Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn Bhd [2003] MLJU 679; [2004] 5 CLJ 167, HC (folld)

MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals [1995] 2 MLJ 493, CA (folld)

Tan Sri Dato' Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors [1995] 1 MLJ 39. HC (folld)

Thuan Lor Holdings Sdn Bhd v Khairoon Bee bte Abdul Karim [1995] MLJU 472; [1995] 1 LNS 459, HC (folld)

Legislation referred to

Federal Constitution art 160

Dinesh Bhaskaran (Denise Tan Kae Ji with him) (Shearn Delamore & Co) for the plaintiff.

Will Sen Kwan (Skrine) for the defendant.

Amelia Tee Abdullah J:

[1] The plaintiff, *Dato' Mohamad Salim bin Fateh Din's* claim against the defendant, *Nadeswaran a/l Rajah*, is, inter alia, for general, special and exemplary damages for damage caused to him as a result of the defendant's publication of defamatory statements against him. The writ of summons and statement of claim of the plaintiff was filed on 31 January 2011.

[2] On 28 February 2014, the defendant was granted leave to enter conditional appearance and to apply to set aside the service of the writ of summons and statement of claim on him, inter alia, on the ground that despite the plaintiff's solicitors having been informed in writing about the defendant's address in the United Kingdom, the documents had been served at the address of the defendant's parents-in-law in Petaling Jaya.

[3] On 11 May 2011, the defendant's application to set aside service of the writ and statement of claim (encl 6) was withdrawn with costs of RM2,000 to be costs in the cause. At the same time, the plaintiff's application for leave to issue a concurrent writ of summons for service out of jurisdiction was allowed. The said writ was served on the defendant at his address at 387, Ilford lane, IGI 2SL Ilford, Essex, England on 7 June 2011. Appearance was entered on 20 June 2011.

[4] On 4 July 2011, the case was called for case management in the presence of Mr Dhinesh Bhaskaran for the plaintiff and in the absence of the defendant. However, the court was informed by the plaintiff's solicitors that they had

mistakenly informed defendant's solicitors that the case management date was on 7 July 2011. They then sought another date and undertook to inform defendant's solicitors of the next date.

[5] The case was called again for case management on 27 July 2011 in the presence of Mr Dhinesh Bhaskaran for the plaintiff. The defendant's solicitors were again absent despite a written notice to them which was acknowledged received by their legal firm. Since the defendant was served on 7 June 2011, the defendant had 21 days to enter appearance and thereafter 14 days to serve his defence. The court was informed that the time for filing and serving the defence had expired on 12 July 2011. In light of the fact that no defence had been served on the plaintiff as at 27 July 2011, counsel for the plaintiff had asked the court to set the case down for hearing. The court then fixed 20 October 2011 for full hearing and 23 August 2011 for case management for the plaintiff to file his bundle of documents.

[6] When the case was called for case management on 23 August 2011, the court was informed by counsel for the defendant that they would be filing an application for abridgement of time. Following that, the defendant through Messrs TK Wong, Tan & Associates, had filed a summons in chambers (encl 18) on 26 August 2011 for the court to approve the filing of the defence on 19 August 2011.

[7] On 26 August 2011, the court had dismissed the defendant's application in encl 18. Following that decision, on the hearing date, the trial progressed without there being any defence filed for the defendant. The court notes that the defendant was physically absent from court on the hearing date.

[8] At the outset, the court had asked parties to address the court as regards the effect of there being no defence in this case. From the authorities, it is clear that where the defendant has failed to serve a defence or where a defence has been struck off, the defendant would be deemed to have admitted the averments of the plaintiff. The defendant would be allowed to testify but only to mitigate as to damages.

[9] The court agrees with the submissions of learned counsel for the plaintiff that there is no doubt as to what the law is. Since there is no defence filed, there is therefore no dispute as to the fact that defamatory statements were made, that the statements were published, and that the plaintiff had suffered damage to his reputation. The defendant's cross-examination would thus have to be limited to mitigating damages only.

[10] Whilst agreeing that he could not present evidence to push forward the defendant's defence, learned counsel for the defendant had submitted that the

defendant should be allowed to cross-examine the plaintiff on contradictions between his evidence and documentary evidence in respect of the defamatory evidence.

[11] On this issue, the court had found that the authorities cited and before the court are clear and unambiguous. When there is no defence before the court, the defendant is now deemed to have admitted each and every averment in the statement of claim. As such, the court found that it was not open to the defendant in this case to either tender the proposed witness, Mohd Kamil Ismail, or to cross-examine the plaintiff's witnesses as regards any positive averments in the statement of claim. All that the defendant would be allowed to do is to cross-examine the plaintiff and his witnesses only as regards the issue of quantum of damages.

[12] The court also notes a number of attempts made by defence counsel to delay the hearing. There was a submission that since the claim is a mixed claim, the plaintiff should have applied by way of motion. The court found this suggestion to be without merit as this is not a situation where the plaintiff is applying for judgment in default but rather a full hearing of an action commenced by writ.

[13] Learned counsel for the defendant had also made an oral application for the judge to recuse herself on the ground that she had 'pre-judged the whole matter'. The court disallowed this application as it was found to be totally without basis. The only reason why the case had reached such an *impasse* with the defendant not having a defence before the court is because counsel had admittedly failed to file the sefence on time. And in his affidavit in support of encl 18, counsel had clearly admitted that he was at fault. The court had thus viewed the recusal application as being made mala fide.

THE PLAINTIFF'S CASE

[14] The plaintiff called his son, *Mohd Imran bin Mohamad Salim* (PW1), a director of GTC Global Sdn Bhd which is part of the Gapurna group of companies. PW1 has a twitter account of which he admits to being a frequent twitter user. He describes twitter as a 'free internet mass-messaging service which can be used to post messages to a network of contacts known as 'followers'. A message sent to your twitter account would result in its being distributed to all your followers. A 'Tweet' is a message limited in length to 140 characters that is sent through twitter. Tweets can also be 'Retweeted', that is, a recipient of a tweet can forward the message to all his followers at the click of a button.

[15] According to PW1, he is a follower of the defendant's tweets. Thus,

every time the defendant posts a message on his twitter website, it would appear on PW1's twitter home page in real-time. It was thus that he first saw the defendant's first and second statements when the defendant posted them on his twitter website.

[16] The first defamatory statement is the statement that was made and published by the defendant on 12 July 2010 via his twitter account to 'tonypua'. The second defamatory statement is the statement that was made and published by the defendant on 22 December 2010 via his twitter website to 'TerencetheSUN'.

[17] According to PW1, the first and second statements are not only viewable by the defendant's followers. He explained that when a person opens a twitter account, he has the option of keeping the twitter account public where it is visible to everyone or else protecting his tweets such that it would be visible only to his followers. The defendant's twitter account is public. This would mean that his tweets are visible to everyone and not just to his followers. Thus a person who is not a follower of the defendant could still view his Tweets by simply accessing the twitter website on the internet.

[18] At Answer 7(iii) of his witness statement, PW1 states that all the tweets on the defendant's twitter account at pp 1–3, 5–6 and 12–17 of the *ikatan dokumen plaintiff* and in pp 1–324 of the *ikatan dokumen tambahan* are tweets sent by the defendant to his followers. As at 22 December 2010, the defendant had 1822 followers. As at 26 September 2011, he had 4113 followers and 4231 followers as at 19 October 2011. This means that every time that the defendant sends out a tweet, it will automatically be sent to his followers in real-time. And these followers will have the option of retweeting the defendant's tweets to all their own followers.

[19] It is PW1's evidence that among the defendant's followers are prominent corporate figures, politicians and media personalities. According to him, the defendant's first and second statements have remained on the defendant's twitter website right up until the date of the hearing on 24 October 2011 and could be read by anyone.

[20] The plaintiff, Datuk Mohamad Salim bin Fateh Din (PW2) testified that he is a businessman and the managing director and shareholder of Gapurna Sdn Bhd, the holding company of the Gapurna group of companies. The Gapurna group is involved in property development, construction, information and communications technology and security services. He is also the director and/or shareholder of an impressive list of companies as set out in the plaintiff's bundles.

[21] The plaintiff describes the largest project undertaken by the Gapurna group as the construction and leasing of a new Shell office building to Shell People Services Asia Sdn Bhd for a lease rental of approximately RM1.1 billion over 15 years. This is a joint venture with Malaysian Resources Corp Bhd.

[22] The plaintiff has also highlighted some of his own personal achievements. He is the Chairman of Giant TMC (Malaysia), Chairman of the Malaysia-Pakistan Business Council, Honorary Investment Counselor for the Board of Investment of the Government of Pakistan and a member of the Boards of Trustees of Yayasan Pendidikan Cheras and Yayasan Amal Wangsa, He has also received honorific awards from His Majesty the Yang Di Pertuan Agong in 2011, from the Sultan of Selangor in 2005, from the Sultan of Pahang in 2000 and the Yang Di Pertua Pulau Pinang in 1997.

[23] The plaintiff describes the defendant as a journalist with *The Sun* newspaper who writes a column under the byline of 'Citizen Nades'. His claim against the defendant is for damages for two defamatory statements that were made by the defendant against him.

THE FIRST DEFAMATORY STATEMENT

[24] The first defamatory statement is a download from the intemet at http://twitter.com/CitizenNades which shows that the following statement was made by the defendant on 12 July 2010 to 'tonypua'. The first statement reads as follows:

> What is Sgor exco's connection to sec 52 dvlment and Salim Fatih Din? Paki masqrding as bumi …

[25] According to the plaintiff, the first statement is defamatory of him as it means or suggests that the plaintiff conceals his heritage; is a dishonest person; is not a bumiputra; and deceives people into believing that he is a bumiputra. The plaintiff states that the first statement is untrue because whilst his grandparents were from Pakistan, both his parents were born in Malaya. The plaintiff himself was born in Malaya before Independence Day. The plaintiff states that he had never concealed his Pakistani heritage and that his appointment as the Honorary Investment Counselor for the Board of Investment of the Government of Pakistan and the Chairman of the Malaysia-Pakistan Business Council which were widely covered by the media would be evidence of that fact.

THE SECOND DEFAMATORY STATEMENT

[26] The second defamatory statement is another download from the

defendant's twitter website which shows a further statement made by the defendant on 22 December 2010 to 'TerencetheSun' which reads as follows:

> brightening to note that tentacles of Paki land thief has entered the PKR heartland! Did we say too much at meeting with AA?

This was followed by another statement to '@nikazmi' as follows:

> FMT story on RM 2 company given contract makes interesting reading. No wonder all support re-development next to PJ Hilton.

[27] According to the plaintiff, the 'FMT story on RM 2 company given contract' refers to an article published in Free Malaysia Today on its website at www.freemalaysiatoday.com on 21 December 2010 entitled 'A case for Selcat: RM 2 firm gets rich contract'. The article states, inter alia, that the Selangor government has awarded a contract to build 9 blocks of high rise buildings in section 52, Petaling Jaya currently occupied by PKNS to Puncak Wangi Sdn Bhd, a RM2 company without calling for tenders. A source claimed that Azmin Ali had allegedly pressured the Selangor Menteri Besar to award the project to Puncak Wangi. According to the records of the Companies Commission of Malaysia, Puncak Wangi was registered under the names of S Vasanthi and Cheong Yoke Ling on 25 September 1995. However a week after the registration, the duo resigned as directors and were replaced by Nurulhaini Rosli, Mahinder Kaur Teja Singh and Zubaidah Ahmad Tajuddin. Out of Puncak Wangi's 200,000 shares, Azmin Ali owns 10,000 shares, Krushiah 5,000 shares whilst the rest belongs to Gapurna Sdn Bhd, a company headed by the millionaire Mohd Salim Fateh Din. A check with the Selangor Lands and Mines office reveals that Mohd Salim also owns Bisraya Construction Sdn Bhd which has placed a caveat on the PKNS land in May the previous year.

[28] The plaintiff's complaint is that the second statement is defamatory of him as it means or suggests that:

(a) he is a land thief and has stolen land; he has acquired land illegally and is involved in illegal land deals; he has acquired land through corrupt dealings with, amongst others, Azmin Ali, the deputy president of PKR; and

(b) he has secured a contract to build nine blocks of high rise buildings in Section 52 Petaling Jaya illegally; he is associated with Azmin Ali and has used his association to secure the contract; he has caused Azmin Ali to pressurise the Menteri Besar into awarding him the contract; he is involved in corrupt practices with Azmin Ali and has acquired the contract through corrupt practices and by supporting PKR.

[29] The plaintiff has testified that the second statement and the contents of

the FMT article are not true. He categorically states that he is not a land thief as alleged by the defendant.

PUBLICATION

[30] On the issue of publication, the plaintiff states that the defendant's tweets can be read by anyone who receives his tweets or who surfs the twitter website. No password is needed to access or view the defendant's tweets. Until the date of the hearing, the first and second statements remain on the defendant's twitter website and have not been removed by him and as such, even up to the date of the hearing, the two statements could still be read by anyone. The plaintiff thus contends that the two defamatory statements have definitely been read by a substantial number of individuals who read or follow the defendant's tweets.

DAMAGE

[31] The plaintiff testified that the two statements had definitely affected his reputation. He had received enquiries from friends, relatives and business acquaintances regarding the two statements. As the defendant is a journalist, people would tend to assume that there is some truth in the statements. As such, the plaintiff claims that he has undergone extreme embarrassment and distress.

[32] It is the plaintiff's belief that the defendant has published the two defamatory statements in order to damage his personal and business reputation. He based his belief on the fact that despite letters from the plaintiff's solicitors to immediately cease and desist in publishing the two statements and to publish a full and unequivocal written apology and retraction of the statements or else the plaintiff would commence legal proceedings, the defendant had, instead of complying with the demand, made the following statement to 'TerencetheSUN':

> hv checked and rechecked! The land thief is trying intimidation! I love a good battle! War is now declared! I'll take him on.

[33] The plaintiff states that this three statement was made to further disparage him and that all three statements were made in order to increase his popularity on the twitter website. Further, the defendant had gone out of his way to prolong the proceedings as can be seen by the sequence of events following the filing of this suit.

[34] As such, the plaintiff is claiming general, aggravated and exemplary

damages, a full and unequivocal public retraction and apology from the defendant and an injunction to restrain the defendant, his servants or agents from further defaming him.

[35] During cross-examination, PW2 denied that he had not suffered any damage through the statement 'Paki masqrding as bumi'. He explained that people with whom he did business and interacted think that he had deceived them. However, he admitted that there was no evidence before the court from these people as to their feelings of being deceived.

[36] The plaintiff also disagreed with the suggestion that he had not suffered any damage as a result of the second statement. He testified that he had suffered humiliation as a result of being called a land thief who was stealing people's land and acquiring land illegally. He disputed that the second statement did not refer to him specifically as it referred to a 'Paki land thief' and not to a Malaysian Malay.

[37] The plaintiff agreed that the 'FMT' story refers to an article published by Free Malaysia Today. Whilst he agreed that he had not taken any action against the publishers of Free Malaysia Today, he disagreed that he could not recover damages from the defendant unless he has taken action against Free Malaysia Today.

[38] As regards the third statement which makes reference to the ethnicity of the land thief, the plaintiff was of the view that the comments referred to him as the defendant's tweet came immediately after the plaintiff's solicitors had sent the defendant an email letter of demand.

[39] The plaintiff agreed that he did not have any documents to show that he had lost any projects, bids or tenders as a result of the defamatory statements. He had not been removed as a director from any of the companies of which he is a director as a result of the defamation. Neither had he been removed as the Honorary Investment Counselor for the Board of Investment of the Government of Pakistan or as a member of the Suruhanjaya Kommunikasi & Multimedia as a result of the defamation.

FINDINGS AND DECISION

[40] In coming to a decision, the court has carefully considered the statement of claim of the plaintiff supported by the evidence of the plaintiff himself and that of his son, PW1. From the outset, it must be stated that the defendant had failed to file his defence on time and his application for extension of time to do so had been dismissed with costs. What then is the effect of the defendant not having a defence before the court?

[41] ln the case of *Tan Sri Dato' Vincent Tan Chee Yioun v Haji Hasan bin Hamzah & Ors* [1995] 1 MLJ 39, Mokhtar Sidin J had cause to deal with this question. In that case, the first to sixth defendants had not filed their defence even though the writ and statement of claim were served on them. There was no application by them for extension of time to file their defence. And at p 49, His Lordship had held as follows:

> As such, for all intents and purposes, there is no defence filed by these defendants. *Since no defence has been filed, the defendants are deemed to admit the averments pleaded by the plaintiff.* Though the first, second, third, fifth and sixth defendants gave evidence in court, I have allowed them to do so only for the purposes of mitigating the damages against them and not as evidence as to their defences. (Emphasis added.)

[42] In the case of *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493, the Court of Appeal had dealt with the issue of the first defendant's default in delivering a defence. The Court of Appeal said that when faced with the first appellant's default in delivering a defence, the respondent had two choices. The first choice was to enter interlocutory judgment and then move on for an assessment of his damages. Alternatively, he could have set the action down for trial. As stated by His Lordship Gopal Sri Ram JCA at p 511:

> In my judgment, a plaintiff in a libel action is not bound to enter default judgment. I certainly see no such compulsion in the language of O 19 r 7 of the Rules of the High Court 1980. He is entitled to proceed and to set the action down for hearing for the purpose of vindicating his reputation and to have his damages assessed. I do not think it lies in the mouth of a defendant who has publicly assailed a person's character to suggest that vindication ought not to be properly obtained.

[43] In *Thuan Lor Holdings Sdn Bhd v Khairoon Bee bte Abdul Karim* [1995] MLJU 472; [1995] 1 LNS 459, the defendant had filed its defence and counterclaim on 1 February 1992. Meantime, the plaintiff had failed to file its defence to the defendant's counterclaim. In dealing with the issue of the effect of the plaintiff not having served a defence to the counterclaim, His Lordship T Selventhiranathan J had this to say:

> Maka pada pendapat saya penghakiman yang diperolehi oleh defendan atas tuntutan balasnya disebabkan keingkaran pembelaan adalah suatu penghakiman yang teratur (regular judgment). Dalam buku mereka 'Commercial litigation', edisi 1987, Goldrein dan Wilkinson mengatakan seperti berikut di ms 370:
>
> > 1. The rule of implied admissions. The defendant must serve his defence before 'the expiration of the period fixed by or under these Rules for service of defence': see Order 19, rules 2–7. The failure to serve any defence brings into play the so-called 'rule of implied admission' under which everything in the statement of

claim is deemed to be admitted by the defendant unless expressly denied. So a failure to serve a defence amounts to an admission by the defendant of everything in the statement of claim: see Order 18, rule 13 and *Cribb v Freyberger* [1919] W&N 22 (CA).

[44] Other authorities in similar vein cited by learned counsel for the plaintiff are *Chang Kow Chin v Kammala a/p S Kumarasamy & Ors* [1998] MLJU 5; [2000] 2 CLJ 167 where Abdul Malik Ishak J held that the effect of a defendant admitting the facts as pleaded in a statement of claim is that the trial would be shortened as no evidence would be led in relation to those admitted facts; *Aetna Universal Insurance Sdn Bhd v Fire Accident & Marine Sdn Bhd* [2001] MLJU 480; [2001] 4 CLJ 753 where T Selventhiranathan J found that there may be deemed admissions by virtue of the rules where there is, inter alia, a default of defence; *Global Destar (M) Sdn Bhd v Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2003] MLJU 679; [2004] 5 CLJ 167 where Abdul Malik Ishak J held that admissions may be made where there is a default of defence.

[45] As such, on the strength of the wealth of authorities as set out above, the court is satisfied that as the defendant has served no defence in this case, he is deemed to have admitted each and every averment as contained in the plaintiff's statement of claim. Consequently, the court will thus only have to deal with the issue of the amount of damages to be awarded to the plaintiff.

[46] In the case of *MGG Pillai*, the Court of Appeal quoted with approval the decision of the learned judge of the High Court as to the factors to be considered when assessing damages. The following were found to be relevant factors:

(a) the position and standing of the plaintiff;

(b) the gravity and seriousness of the libel;

(c) the mode and extent of the publication;

(d) the mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel;

(e) the uncertainty undergone in litigation;

(f) the conduct of the defendants from the time of the libel down to the very moment of the verdict; and

(g) the absence or refusal of any correction, retraction or apology. The court will deal briefly with each of these factors in turn.

THE POSITION AND STANDING OF THE PLAINTIFF

[47] Who is the plaintiff? This issue is relevant as the position and stature of the plaintiff who has been defamed is relevant in considering the amount of damages to be awarded in this case. The plaintiff had recounted at length on his position as the managing director and shareholder of Gapurna Sdn Bhd, the holding company of the Gapurna Group of companies and the various types of businesses that the Gapurna Group is involved with. The plaintiff has also testified as to the many large scale and billion ringgit projects undertaken by the Group.

[48] Equally pertinent are the plaintiff's personal achievements. He is the Chairman of Giant TMC (Malaysia), Chairman of the Malaysia-Pakistan Business Council, Honorary Investment Counselor for the Board of Investment of the Government of Pakistan and a member of the Boards of Trustees of Yayasan Pendidikan Cheras and Yayasan Amal Wangsa, he had also received numerous honorific awards from His majesty the Yang Di Pertuan Agong in 2011, from the Sultan of Selangor in 2005, the Sultan of Pahang in 2000 and from the Yang Di Pertua Pulau Pinang in 1997.

[49] The court is thus left in no doubt that the plaintiff is a man of standing and importance in business, both locally and regionally/internationally, and in society. Accordingly, the court has no hesitation in accepting that the plaintiff is a prominent person with a good standing and who holds key positions in society and business, a person who is held in high esteem and whose reputation would be seriously damaged by the defamatory statements.

GRAVITY AND SERIOUSNESS OF THE DEFAMATION

[50] The gravity and seriousness of the defamatory statements can be seen from the two statements. In the first defamatory statement, the plaintiff is referred to by name as a 'Paki masqrding as a bumi'. This statement would mean that the plaintiff is not a Bumiputra, he is dishonest and deceives people into believing that he is a Bumiputra and that he conceals his Pakistani heritage.

[51] The court accepts the evidence of the plaintiff that although his grandparents were Pakistanis, both his parents as well as the plaintiff himself were born in Malaya/Malaysia. As such, the court has no reason to doubt that the plaintiff is a Bumiputra of Pakistani descent. Further, the court accepts that the plaintiff has not concealed his Pakistani heritage as can be seen in his involvement as the Honorary Investment Counselor for the Board of Investment of the Government of Pakistan and as Chairman of the Malaysia-Pakistan Business Council. The court accepts that by virtue of art 160

of the Federal Constitution, the plaintiff is a Malay and consequently a Bumiputra. It follows there from that the plaintiff could not be masquerading as a Bumiputra.

[52] As regards the second statement, the court finds that this defamatory statement has a more serious and damaging effect. The words 'Paki land thief' denotes a dishonest person who is a land thief and who has stolen land; a person who has acquired land illegally or who is involved in illegal land deals. The court finds that the imputations from this statement and the phrase 'Paki land thief' to be severely damaging, especially to a person such as the plaintiff who is actively involved in the business of property development and construction which would by necessity require land.

THE MODE AND PUBLICATION OF THE DEFAMATION

[53] The two defamatory statements were posted on the defendant's twitter website. As at 26 September 2011, the defendant had 4,113 followers. The court notes that as at 27 April 2012, the defendant has 4997 followers. The defendant's tweets would be distributed real time to all his followers. These followers could then re-tweet the defendant's postings to their own followers. In addition, since the defendant has kept his tweets public, this would mean that his twitter website and his tweets would be accessible to anyone who goes into his website.

[54] As such, the court agrees that the extent of publication of the defamatory statements goes far in excess of the 4113 followers as at 26 September 2011 or the 4997 followers as at today.

MENTAL DISTRESS, HURT, ANXIETY AND MENTAL ANGUISH

[55] The plaintiff has testified that as a result of the defendant's publication of the two defamatory statements, he had been injured in his personal and business reputation and had undergone extreme embarrassment and distress. He has been exposed to hatred, contempt and ridicule and suffered damage.

[56] It is his evidence that some of the followers who follow the defendant's twitter account had contacted the plaintiff after reading the two defamatory statements. He had had to explain that the allegations were baseless. It is his evidence that he had suffered damage because his business partners, people whom he developed for, people whose companies he chaired, and government people to whom he submitted his forms, all think that he had deceived them.

[57] Learned counsel for the defendant has submitted that the defendant has not provided any evidence of the loss and damage that he had suffered. He has

not lost any of his appointments or directorships. He has not suffered any losses to his businesses. As such, the defendant contends that the plaintiff has not sustained any loss or damage from the defamatory statements and as such only nominal damages should be awarded.

[58] In this context, the court relies on the case of *MGG Pillai v Tan Sri Vincent Tan* where the Court of Appeal held as follows:

> Counsel for the respondent, in answer to the submission made on behalf of the appellants, relied on the following passage from *Lachman v Pyarchand* AIR 1959 Raj 169, at p 175 which, in my view correctly states the law:
>
> > In the second place, the learned civil judge seems to have thought that the plaintiff had failed to prove the damages claimed by him and therefore he was not entitled to claim any. Now, so far as this aspect of the case goes, I desire to say, first that damages are of two kinds: general and special, and the learned civil judge does not appear to have appreciated the distinction between them, and second, that while special damages are required to be specifically pleaded and proved general damages are not.
> >
> > General damages are damages which the law presumes to flow from, and as if it were the natural and probable consequence of the defendants' act. Therefore general damages need not be pleaded specifically nor need any evidence be produced to prove them as such. I have no doubt that having regard to the pleadings of the plaintiff in the present case, what he really claimed for was general and not special damages.

[59] As such, relying on the authority as cited above, the court finds that there is no merit in the defendant's submissions that since the plaintiff has not proven the quantum of the losses that he had suffered as a result of the defamatory statements, he should not be entitled to the damages sought.

THE UNCERTAINTY OF LITIGATION

[60] On the uncertainty undergone in litigation, learned counsel for the plaintiff has submitted that the plaintiff has had to endure the litigation and the various attempts by the defendant to delay the litigation. The court agrees that there is uncertainty in all litigations. In this case, this has been compounded by the various delays caused by the diverse attempts to serve the defendant.

THE CONDUCT OF THE DEFENDANT FROM THE TIME OF THE LIBEL

[61] Vide a letter dated 30 December 2010, the plaintiff's solicitors had written to the defendant to cease and desist from further publishing the first

and second defamatory statements and to publish a full and unequivocal apology and retraction. The plaintiff also indicated his intention to commence legal proceedings against the defendant in respect of the defamatory statements. Not only did the defendant fail to reply to the said letter but instead he had further published another statement on his twitter website which would suggest that he had no intention to cease and desist. The court agrees with learned counsel for the plaintiff that the words in the said statement: 'The land thief is trying intimidation! I love a good battle! War is now declared! I'll take him on' would reflect the defendant's arrogance and dismissive of the plaintiffs efforts to resolve the matter. The court is of the view that this factor would clearly lend towards a higher amount in damages.

ABSENCE OF CORRECTION, RETRACTION OR APOLOGY

[62] And lastly, the court has considered the absence of any attempt by the defendant to correct his statements, to retract his statements or else to offer or publish an apology. These steps, had they been done, would have gone a long ways towards reducing the quantum of damages. Here, not only was there no retraction or apology, the defendant was in fact priming himself up for a 'battle'. This, more than anything else, would reflect the absence of any intention to retract or to apologise. On the contrary, the defendant's tweets remains on his twitter website right up to the date of the hearing.

DAMAGES

[63] The court has duly considered all the aforestated factors and is of the view that aggravated damages can be awarded in light of the defendant's conduct in failing to make any apology, failure to withdraw the offending statements from his website thus allowing the defamatory statements to continue to be published right up to the date of the hearing.

[64] In considering the amount of damages and aggravated damages to be awarded in this case, the court has considered that the defendant is a journalist whose column Citizen Nades garners a healthy following. The defendant's column regularly deals with issues of public interests which invites discussions and thought amongst his readers. His twitter website with more than 4000 followers and any number of casual drop-ins would naturally see heavy traffic. The court is thus of the view that the defendant should have exercised a greater degree of care over his tweets knowing full well that it could and would be seen by many. Where he fails to exercise a proper degree of care with his postings and in the process injures another with his defamatory postings, he must be held accountable and responsible to pay for it. The amount of damages and aggravated damages must be such as to send a strong message to those who are in a position to disseminate information widely, whether though the printed

media or through the internet, that they must exercise a proper degree of care and diligence not to injure others. They must curb and regulate themselves so as not to run afoul of the law.

[65] In all the circumstances of this case, the court is of the view that a sum of RM300,000 for general damages and another RM200,000 for aggravated damages would be a fair and proper to reflect the damage that has been caused by the publication of the defamatory words. The court has not awarded exemplary damages as it is unable to see any basis in awarding any damages under this head which has not been already awarded under general and aggravated damages. The court also grants an injunction to restrain the defendant whether by himself, his servants or agents from further publishing or causing to be published the first and second statements or any similar words defamatory of the plaintiff in whatsoever manner. In light of the fact that an injunction is now granted and damages and aggravated damages awarded, which amount is sufficient to vindicate the plaintiff, the court has not granted prayer (iii). The court awards interest on the general and aggravated damages at the rate of 4%pa from the date of judgment until the date of full payment. Costs are to be taxed unless otherwise agreed between the parties.

Order accordingly.

Reported by Ashok Kumar